PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: APR 0 3 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner was a reseller of computer networking hardware. It sought to permanently employ the beneficiary in the United States as a channel manager and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

On January 28, 2009, the Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage for the subject position. The petitioner filed a timely appeal with some additional documentation – including copies of its federal income tax return for 2007, the beneficiary's pay stubs from September 2008 to January 2009, the beneficiary's Form W-2, Wage and Tax Statement, for 2008, and the petitioner's bank statements from January 2008 through December 2008.

On December 28, 2011, the AAO sent the petitioner a Notice of Derogatory Information and Request for Evidence (NDI/RFE). The AAO noted that the official website of the California Secretary of State identified the petitioning entity – Onestream.net, Inc. – as dissolved. Noting that the petition would be moot if the petitioning entity is no longer an active business, the AAO requested that this evidentiary issue be resolved by the petitioner. The AAO also requested the submission of additional evidence that the petitioner has had the continuing ability to pay the proffered wage from the priority date (December 7, 2007) up to the present. In particular, the AAO requested copies of the petitioner's federal income tax returns for the years 2008, 2009, and 2010 and W-2 forms issued to the beneficiary for the years 2009, 2010, and 2011 (or a final earnings statement for 2011 in lieu of a Form W-2).

The AAO received a response from counsel on February 21, 2012, confirming that Onestream.net, Inc. (Onestream.net) was dissolved and indicating that a new corporate entity – Onestream Technologies, Inc. (OTI) – was operating in its place in the same line of business. Counsel stated that the proffered position continues to exist. Along with his letter counsel submits the following documentation relating to the alleged corporate succession and the petitioner's ability to pay the proffered wage:

---

[1] The regulation at 8 C.F.R. § 204.5(k)(2) defines advanced degree as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Thus, there are two issues on appeal:

(1) [redacted] Inc. established that it is the legal successor-in-interest to the original petitioner, [redacted]

(2) Has the petitioner established its continuing ability to pay the proffered wage of the subject position from the priority date up to the present?

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

Successor-in-Interest issue

U.S. Citizenship and Immigration Services (USCIS) has issued no regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter*

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

of Dial Auto") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of* [redacted], are instructive in this matter. The case involved a petition filed by [redacted] Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [redacted], filed the underlying labor certification. On the petition, [redacted] claimed to be a successor-in-interest to [redacted] The part of the Commissioner's decision relating to the successor-in-interest issue follows:

> Additionally, the representations made by the petitioner concerning the relationship between [redacted] and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to [redacted], counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [redacted] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of* [redacted] *rights, duties, obligations*, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

Matter of [redacted] does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[3] *Id.* at 1569 (defining "successor"). When considering other business

[3] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although

organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.[4]

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property – to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[5] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the

---

continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

[4] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

[5] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay the proffered wage to the beneficiary. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the foregoing analysis to the instant petition, the AAO determines that [redacted] has not established a valid successor-in-interest relationship to [redacted] Inc. for immigration purposes. In Schedule K-1 of the federal income tax return filed by [redacted] for 2007, [redacted] is identified as the company's sole shareholder with 100% of the stock.[6] When OTI was incorporated on October 16, 2009, however, the accompanying "Statement of Incorporator" named [redacted] as the initial shareholder "until [her] successors are elected and qualify." A letter from the Incorporator to [redacted] on the same date indicated that she owned 1,500 shares of OTI.[7] No further documentation has been submitted indicating any change in the ownership of OTI. Thus, as far as the record shows, there was not a continuity of ownership from Onestream.net to OTI. While the former was 100% owned by [redacted] the latter is 100% owned by [redacted]. The record contains no contract or agreement of any kind between [redacted] and OTI. Most importantly, there is no evidence as to what assets and liabilities, as well as legal rights and obligations, if any, were conveyed from one entity to the other. In all of the corporate documentation submitted in response to the NDI/RFE, not one refers to both Onestream.net and OTI in the same document. OTI was incorporated in October 2009 without reference to [redacted] was dissolved in May 2010 without reference to OTI. It appears that OTI simply picked up the business abandoned by [redacted] which does not establish a *bona fide* successor-in-interest relationship. It is also unclear from the record as to when this event occurred.

For the reasons discussed above, the petitioner has failed to establish that [redacted] is the successor-in-interest to the petitioner, [redacted]. Since [redacted] is dissolved, its petition cannot be approved. A petitioner must intend to employ the beneficiary in order to maintain an employment-based petition. *See* 8 C.F.R. § 204.5(c). Furthermore, the ETA Form 9089 is only valid for the particular job opportunity certified therein. *See* 20 C.F.R. § 656.30(c).

---

[6] The organizational chart for [redacted] submitted in response to the NDI/RFE identifies the following employees: (1) [redacted] (2) [redacted] (3) Channels Manager (the proffered position, unfilled); (4) [redacted]

[7] The organizational chart for OTI submitted in response to the NDI/RFE shows a reshuffling of the company's positions, with (1) [redacted] (2) [redacted] (3) [redacted]) Staffing Services Manager – unfilled; and (5) Channels Manger (the proffered position) – unfilled.

Ability to Pay issue

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application (ETA Form 9089) was accepted by the DOL on December 7, 2007. Box G of the form states that the "offered wage" for the channel manager position is $33.57 per hour, which amounts to a $61,097.40 per year based on a 35-hor work week and on the offered wage set forth in Part 6 of the Form I-140.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage from the priority date up to the present, the AAO first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record in this case indicates that the beneficiary worked for the petitioner from September 2008 through May 2009. While the beneficiary's earnings statements show that his pay exceeded the proffered wage during that time, his period of employment spans only a fraction of the time between the priority date (December 7, 2007) and the present. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date up to the present through its actual compensation to the beneficiary.

As an alternate means of determining the petitioner's ability to pay the proffered wage, the AAO examines the net income figures reflected on the petitioner's federal income tax returns, without

the petitioner, [redacted] In addition, the petitioner has failed to establish its ability to pay the proffered wage for the channel manager from the priority date up to the present. The petition will be denied on both of these grounds, with each considered as an independent and alternative ground for denial.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.